Special Supplement

to

Texas Criminal Pattern Jury Charges

Intoxication, Controlled Substance & Public Order Offenses

2019 Edition

This special supplement consists of revisions made necessary by the Texas Court of Criminal Appeals opinion *Beltran De La Torre v. State*, No. PD-0561-18, 2019 WL 4458576 (Tex. Crim. App. Sept. 18, 2019), and by the 2019 addition of Tex. Agric. Code § 121.001 and amendment to Tex. Health & Safety Code § 481.002(26). *See* Acts 2019, 86th Leg., R.S., ch. 764, §§ 2, 8 (H.B. 1325), eff. June 10, 2019.

Important: With the above exceptions, this supplement does not reflect any action by the 2019 Texas legislature. It contains only revisions made necessary by *Beltran De La Torre v. State* and by H.B. 1325. Please consult the 2019 volume in addition to the supplement to obtain complete charge and explanatory comment language.

Follow the instructions on the back of this supplement to affix it to the inside back cover of the 2019 main volume. To install the updated digital download, please visit **www.texasbarcle.com/cpjc-intoxication-2019**. If you have difficulty of any kind, please contact us at **books@texasbar.com** or by phone at (800) 204-2222, ext. 1499, or (512) 427-1499.

Prepared by the

COMMITTEE

on

PATTERN JURY CHARGES—CRIMINAL

of the

STATE BAR OF TEXAS

Austin 2019

The State Bar of Texas, through its TexasBarBooks Department, publishes practice books prepared and edited by knowledgeable authors to give practicing lawyers as much assistance as possible. The competence of the authors ensures outstanding professional products, but, of course, neither the State Bar of Texas, the editors, nor the authors make either express or implied warranties in regard to their use. Each lawyer must depend on his or her own knowledge of the law and expertise in the use or modification of these materials.

IRS CIRCULAR 230 NOTICE: To ensure compliance with requirements imposed by the IRS, we inform you that (1) this written material was not intended or written by the author(s) to be used for the purpose of avoiding federal penalties that may be imposed on a taxpayer; (2) this written material cannot be used by a taxpayer for the purpose of avoiding penalties that may be imposed on the taxpayer; (3) this written material cannot be used in promoting, marketing, or recommending to another party any tax-related transaction or matter; and (4) a taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

The use of the masculine gender throughout this publication is purely for literary convenience and should, of course, be understood to include the feminine gender as well.

International Standard Book Number: 978-1-938873-69-0
International Standard Book Number: 978-1-938873-77-5 (Special Supplement)

Austin, Texas 78711

Printed in the United States of America

This book contains material previously published in *Texas Criminal Pattern Jury Charges—Intoxication and Controlled Substances* and *Texas Criminal Pattern Jury Charges—Preparatory Crimes.*

COMMITTEE ON PATTERN JURY CHARGES—CRIMINAL

2018–2019

WENDELL A. ODOM, JR., *Chair*
EMILY JOHNSON-LIU, *Vice-Chair*
HON. KEVIN YEARY, *Court of Criminal Appeals Liaison*

JORGE G. ARISTOTELIDIS
CHRISTOPHER RYAN BRASURE
HON. ROBERT E. CADENA
KENDA L. CULPEPPER
ALAN KEITH CURRY
HON. KEITH DEAN
JEFFREY LEWIS EAVES
ANDREW FLETCHER
HON. MELISSA GOODWIN
RUSSELL I. GUNTER II
JENNIFER E. LAURIN
JAMES GERARD MCDERMOTT II
CRAIG J. MOORE
ELIZABETH PONCE
STANLEY G. SCHNEIDER
HON. BEN SMITH
BARRY SORRELS
LLOYD VAN OOSTENRIJK

ZACKERY JAMES WAVRUSA

COMMITTEE ON PATTERN JURY CHARGES—OVERSIGHT

2018–2019

HON. JANE BLAND, *Chair*
HON. ANA ESTEVEZ, *Vice-Chair*
HON. JOHN P. DEVINE, *Supreme Court Liaison*

J. ARNOLD AGUILAR
BROCK C. AKERS
ALEXANDRA W. ALBRIGHT
KIRSTEN M. CASTAÑEDA
HON. DIANE DEVASTO
HON. AIDA FLORES
JOHN BLAISE GSANGER
MARY T. HENDERSON
HON. DAN HINDE
SUSAN R. KLEIN
JEFFREY S. LEVINGER
H.E. MENDEZ
BRIAN MILLER
HON. EMILY MISKEL
HON. LANA MYERS
LADAWN H. NANDRASY
SARAH PATEL PACHECO
DAN POZZA
MICHAEL L. SLACK
HON. CATHERINE STONE

HON. TIMOTHY SULAK

STATE BAR OF TEXAS

2018–2019

JOE K. LONGLEY, *President*
LAURA GIBSON, *Chair of the Board*
HON. XAVIER RODRIGUEZ, *Chair, Committee on Continuing Legal Education*
SARAH CLOWER KEATHLEY, *Chair, Professional Development Subcommittee*
TREY APFFEL, *Executive Director*

SHARON SANDLE, *Director*
JILL HOEFLING, *Assistant Director*
DAVID W. ASHMORE, *Project Publications Attorney*
ELMA E. GARCIA, *Publications Attorney*
SUSANNAH R. MILLS, *Publications Attorney*
JAMES W. NORMAN, *Publications Attorney*
VICKIE TATUM, *Publications Attorney*
MICHAEL AMBROSE, *Senior Editor*
COURTNEY CAVALIERE, *Editor*
ROGER SIEBERT, *Editor*
TRAVIS RIDDLE, *Production Supervisor*
JENNIFER TOWNSEND, *Production and Editorial Assistant*
CYNTHIA DAY, *Meeting Coordinator*
LARA TALKINGTON, *Marketing Coordinator*
CONOR JENSEN, *Website Manager*
JENNIFER KARLSSON, *Web Content Specialist*
JENNIFER PEREZ, *Web Content Specialist*
ANISSA SAMANIEGO, *Sales Coordinator*

CONTENTS

CPJC 41.6 Defining "Possession"

The Texas Penal Code and the Texas Health and Safety Code each contain a brief definition of "possession": "'Possession' means actual care, custody, control, or management." *See* Tex. Penal Code § 1.07(a)(39); Tex. Health & Safety Code § 481.002(38). In a prosecution for possession of a controlled substance, the jury should be instructed on at least this statutory definition of possession. *See Reed v. State*, 479 S.W.2d 47, 48 (Tex. Crim. App. 1972). The difficult question is what more, if anything, is permissible and desirable.

The question is difficult because much and perhaps all of the law in appellate discussions appears in a format that makes it inappropriate for incorporation into the instructions.

Links Law. In appellate considerations of the sufficiency of evidence to support convictions for possession of controlled substances, discussion has often been in terms of the "affirmative links" the state must prove between the accused and the substance.

In *Evans v. State*, 202 S.W.3d 158 (Tex. Crim. App. 2006), the court of criminal appeals observed that "the 'affirmative links' rule is not an independent test of legal sufficiency." Rather, it is "a shorthand catch-phrase for a large variety of circumstantial evidence that may establish the knowing 'possession' or 'control, management, or care' of some item such as contraband." The court added that the word *affirmative* lends nothing to the meaning and indicated that discussion would be in terms of only "links." *Evans*, 202 S.W.3d at 162 n.9.

Evans summarized what should now be called "links law" as follows:

> Regardless of whether the evidence is direct or circumstantial, it must establish that the defendant's connection with the drug was more than fortuitous. . . . Mere presence at the location where drugs are found is thus insufficient, by itself, to establish actual care, custody, or control of those drugs. However, presence or proximity, when combined with other evidence, either direct or circumstantial (e.g., "links"), may well be sufficient to establish that element beyond a reasonable doubt. It is, as the court of appeals correctly noted, not the number of links that is dispositive, but rather the logical force of all of the evidence, direct and circumstantial.

Evans, 202 S.W.3d at 161–62 (footnotes omitted). *See also Allen v. State*, 249 S.W.3d 680, 704 (Tex. App.—Austin 2008, no pet.).

Constructive Possession. Some jurisdictions distinguish between "actual" possession and "constructive" possession. The Committee struggled with whether jury instructions in possession cases should communicate to juries that the state may prevail on proof of what many jurisdictions would term "constructive possession."

Texas criminal law has long recognized the concept of constructive possession in a general sense. *E.g., Modica v. State*, 251 S.W. 1049, 1051 (Tex. Crim. App. 1923) (jury in theft prosecution instructed that "constructive possession was that possession which the law annexes to the legal title or ownership of property when there is a right to the immediate actual possession").

The term *constructive possession* has occasionally been used in appellate discussions of possession of controlled substances. *Shortnacy v. State*, 474 S.W.2d 713, 716–17 (Tex. Crim. App. 1972) ("The crime of possession of narcotics requires a physical or constructive possession with actual knowledge of the presence of the narcotic substance.") (quoting *State v. Carr*, 445 P.2d 857, 859 (Ariz. Ct. App. 1968)). In Texas law, however, what other jurisdictions call constructive possession is simply one aspect of links law:

> [C]ontrol may be shown by actual or constructive possession, and knowledge being subjective, must always be inferred to some extent, in the absence of an admission by the accused. An affirmative link to the person accused with the possession of narcotics may be established by showing independent facts and circumstances which indicate the accused's knowledge and control of the narcotics.

McGoldrick v. State, 682 S.W.2d 573, 578 (Tex. Crim. App. 1985) (quoting *Rodriquez v. State*, 496 S.W.2d 46 (Tex. Crim. App. 1973)).

There is, however, one mysterious case law reference to jury instructions on the term. In *Parasco v. State*, 323 S.W.2d 257 (Tex. Crim. App. 1959), the court of criminal appeals reversed on other grounds a conviction for possession of heroin. It then added, "We have concluded that the paragraph in the charge in which the court discusses constructive possession is, under the facts of this case, a charge on the weight of the evidence, and appellant's objection thereto on such grounds should have been sustained." *Parasco*, 323 S.W.2d at 259.

Parasco did not set out or discuss the disapproved instruction. The instruction *Parasco* disapproved was that "[a] person may be in constructive possession of an article or thing which is not physically present on his person, providing that he is in such juxtaposition of the article that he could exert dominion or control over the article at his will." Brief for Appellant at 36, *Parasco v. State*, No. 30491 (Tex. Crim. App. Mar. 4, 1959).

Joint Possession. "Possession of a controlled substance need not be exclusive and evidence which shows that the accused jointly possessed the controlled substance with another is sufficient." *Brooks v. State*, 529 S.W.2d 535, 537 (Tex. Crim. App. 1975) (citations omitted). In *Beltran De La Torre v. State*, ___ S.W.3d ___, No. PD-0561-18, 2019 WL 4458576, at *5 (Tex. Crim. App. Sept. 18, 2019), the court of criminal appeals held that a jury instruction on joint possession, including the instruction "Two or more people can possess the same controlled substance at the same

time," is an impermissible comment on the weight of the evidence. The court held that while the instruction was "substantively correct," it was unnecessary to clarify the law. The jury charge in *Beltran De La Torre* included the statutory definition of "possession"—"Possession means actual care, custody, control, or management"—and this, the court held, adequately covered the applicable law because it encompassed the concept of joint possession and gave the parties a basis for arguing that concept to the jury. *See* Tex. Health & Safety Code § 481.002(38). Because it was already adequately covered, a nonstatutory instruction on joint possession would only draw the jury's attention to evidence supporting the state's argument that the defendant in that case possessed the drugs along with others. It highlighted one particular path to establishing the element of possession, and the state is not entitled to that emphasis. *Beltran De La Torre*, 2019 WL 4458576, at *5. The court also concluded that a proposed instruction on mere presence constituted a comment on the weight of the evidence. *Beltran De La Torre*, 2019 WL 4458576, at *7. Consequently, neither is included in the instructions that follow. But by agreement on the record, the parties and trial court could decide to include such instructions to clarify the law in a particular case. Instructions for that scenario are set out below.

Mere Presence Instructions and Other Aspects of Links Law. Case law discussions, particularly in more recent cases, characterize links law as inappropriate for jury instructions. *E.g., Deener v. State*, 214 S.W.3d 522, 530 (Tex. App.—Dallas 2006, pet. ref'd) ("Because the affirmative-links rule is only a shorthand expression for evaluating the sufficiency of the evidence, instructing the jury on the affirmative-links rule would be improper."). A frequently quoted analysis concluded, "Affirmative links, like the reasonable hypothesis theory, is a technical legal standard of review which is not meant for use by the jury and would only lead to confusion and distraction." *Davila v. State*, 749 S.W.2d 611, 614 (Tex. App.—Corpus Christi–Edinburg 1988, pet. ref'd).

The Committee was convinced that case law prohibits placing into jury instructions what purports to be a comprehensive summary of links law.

At one time, instructions using limited portions of links law were permitted. In 1975, the court of criminal appeals held that the defendant in a prosecution for possession of marijuana was entitled to a charge on mere presence at the scene. *See McShane v. State*, 530 S.W.2d 307, 308 (Tex. Crim. App. 1975); *see also Musick v. State*, 862 S.W.2d 794, 798 (Tex. App.—El Paso 1993, pet. ref'd). But in 2019, the court of criminal appeals recognized that *McShane* had been undermined by *Giesberg v. State*, 984 S.W.2d 245, 250 (Tex. Crim. App. 1998), and was "no longer good law." *Beltran De La Torre*, 2019 WL 4458576, at *7 & n.6. *Beltran De La Torre* held that an instruction on joint possession and an instruction that "Mere presence at a place where narcotics are found is not enough to constitute possession" are both impermissible comments on the weight of the evidence because these concepts are already adequately covered by

jury instructions that include the statutory definition of "possession" and would only serve to emphasize one party's theory. *Beltran De La Torre*, 2019 WL 4458576, at *7.

The Committee concluded, of course, that jury instructions should include the statutory definition of possession. It also agreed that under existing law the instructions should neither mention nor attempt to define so-called constructive possession and should neither mention links law nor attempt a summary of it.

In light of *Beltran De La Torre*'s holding on joint possession and mere presence instructions, the Committee concluded that the court of criminal appeals would also find it an impermissible comment on the weight of the evidence to instruct the jury that mere knowledge of someone else's possession does not constitute possession. Consequently, none of these statements of law are included in the instructions that follow. That said, the parties and trial court could agree to include such instructions if they believed it would help clarify the law in a given case and if such agreement were made on the record. For those situations, the Committee recommends the following formulations of joint-possession, mere-presence, and knowledge-of-another's-possession instructions:

> Two or more people can possess the same controlled substance at the same time.
>
> If the evidence shows only that the defendant was at a place where the controlled substance was being possessed, that evidence alone is not enough to convict him.
>
> If the evidence shows only that the defendant knew that someone else was in possession of the controlled substance, that evidence alone is not enough to convict him.

CPJC 41.8 Instruction—Possession of Marijuana—Class B Misdemeanor (with Voluntariness Requirement)

INSTRUCTIONS OF THE COURT

Accusation

The state accuses the defendant of having committed the offense of possession of marijuana. Specifically, the accusation is that [*insert specific allegations, e.g.*, the defendant did intentionally or knowingly possess a usable quantity of marijuana of two ounces or less].

Relevant Statutes

A person commits an offense if the person knowingly possesses a usable quantity of marijuana of two ounces or less.

To prove that the defendant is guilty of possession of marijuana, the state must prove, beyond a reasonable doubt, [three/four] elements. The elements are that—

1. the defendant possessed marijuana; and
2. the marijuana was of a usable quantity; and
3. the defendant knew he was possessing marijuana [./; and]

[Include the following if raised by the evidence.]

4. the defendant's possession of the marijuana was voluntary.

[Include the following if raised by the evidence.]

The state must prove that the defendant's possession of marijuana was voluntary. Possession of marijuana is voluntary if the defendant had control of the marijuana and was aware of that control for a sufficient time to permit him to terminate the control.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of possession of marijuana.

Definitions

Possession

"Possession" means actual care, custody, control, or management.

Knew He Was Possessing Marijuana

The phrase *knew he was possessing marijuana* means a person was aware that he was possessing something and that this something was marijuana.

Marijuana

"Marijuana" means the plant Cannabis sativa L., whether growing or not, the seeds of that plant, and every compound, manufacture, salt, derivative, mixture, or preparation of that plant or its seeds. The term *marijuana* does not include—

1. the resin extracted from a part of the plant or a compound, manufacture, salt, derivative, mixture, or preparation of the resin; or

2. the mature stalks of the plant or fiber produced from the stalks; or

3. oil or cake made from the seeds of the plant; or

4. a compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, fiber, oil, or cake; or

5. the sterilized seeds of the plant that are incapable of beginning germination; or

6. any part of the plant with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.

Application of Law to Facts

You must decide whether the state has proved, beyond a reasonable doubt, [three/four] elements. The elements are that—

1. the defendant possessed marijuana in [*county*] County, Texas, on or about [*date*]; and

2. the marijuana was of a usable quantity; and

3. the defendant knew he was possessing marijuana [./; and]

[Include the following if raised by the evidence.]

4. the defendant's possession of the marijuana was voluntary.

[Continue with the following.]

You must all agree on elements [1, 2, and 3/1, 2, 3, and 4] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements [1, 2, and 3/1, 2, 3, and 4] listed above, you must find the defendant "not guilty."

If you all agree the state has proved each of the [three/four] elements listed above, you must find the defendant "guilty."

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.*]*

COMMENT

Possession of marijuana is prohibited by and defined in Tex. Health & Safety Code § 481.121. The definition of "marijuana" is derived from Tex. Health & Safety Code § 481.002(26) and Tex. Agric. Code § 121.001. The definition of "possession" is from Tex. Health & Safety Code § 481.002(38) and Tex. Penal Code § 1.07(a)(39).

Definition of "Usable Quantity." It is not error for a trial court to refuse to define usable quantity. *E.g., Holmes v. State*, 962 S.W.2d 663, 674 (Tex. App.—Waco 1998, pet. ref'd, untimely filed).

Part of Plant Properly Considered in Determining Weight. In determining the amount of marijuana possessed, the statutory definition permits the jury to include "the plant Cannabis sativa L., whether growing or not," but not "the mature stalks of the plant" or hemp, among other things. Tex. Health & Safety Code § 481.002(26). In *Young v. State*, 922 S.W.2d 676 (Tex. App.—Beaumont 1996, pet. ref'd), the Beaumont court of appeals, relying on *Doggett v. State*, 530 S.W.2d 552, 555 (Tex. Crim. App. 1975), held that "it was the defendant's burden at trial to present evidence of the weight of any materials excluded from the statutory definition of marijuana so as to show the weight alleged and/or proven by the State was incorrect." *Young*, 922 S.W.2d at 677. The case does not address what, if anything, this requires of the jury instruction.

Apparently, it is sufficient if the jury instruction makes clear the weight that must be proved and the statutory definition of marijuana so that the jury can determine what—if any—part of the material relied on by the state should be excluded in determining whether the defendant possessed a specific quantity.

Voluntariness Requirement Language. The voluntariness requirement language is included in this instruction only. It could, of course, be modified and incorporated

into any of the other instructions to which the requirement applies. See also the voluntary possession comment at CPJC 41.7.

CPJC 41.9 Instruction—Possession of Marijuana—Other Grades

INSTRUCTIONS OF THE COURT

Accusation

The state accuses the defendant of having committed the offense of possession of marijuana. Specifically, the accusation is that [*insert specific allegations, e.g.*, the defendant did intentionally or knowingly possess a usable quantity of marijuana of four ounces or less but more than two ounces].

Relevant Statutes

A person commits an offense if the person knowingly possesses a usable quantity of marijuana of [*insert specific amount, e.g.*, four ounces or less but more than two ounces].

To prove that the defendant is guilty of possession of marijuana, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant possessed marijuana; and

2. the marijuana was of a usable quantity; and

3. the marijuana weighed more than [*insert specific amount, e.g.*, two ounces]; and

4. the defendant knew he was possessing marijuana.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of possession of marijuana.

Definitions

Possession

"Possession" means actual care, custody, control, or management.

Knew He Was Possessing Marijuana

The phrase *knew he was possessing marijuana* means a person was aware that he was possessing something and that this something was marijuana.

Marijuana

"Marijuana" means the plant Cannabis sativa L., whether growing or not, the seeds of that plant, and every compound, manufacture, salt, derivative, mixture, or preparation of that plant or its seeds. The term *marijuana* does not include—

1. the resin extracted from a part of the plant or a compound, manufacture, salt, derivative, mixture, or preparation of the resin; or

2. the mature stalks of the plant or fiber produced from the stalks; or

3. oil or cake made from the seeds of the plant; or

4. a compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, fiber, oil, or cake; or

5. the sterilized seeds of the plant that are incapable of beginning germination; or

6. any part of the plant with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.

Application of Law to Facts

You must decide whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant possessed marijuana in [*county*] County, Texas, on or about [*date*]; and

2. the marijuana was of a usable quantity; and

3. the marijuana weighed more than [*amount*]; and

4. the defendant knew he was possessing marijuana.

You must all agree on elements 1, 2, 3, and 4 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant "not guilty."

If you all agree the state has proved each of the four elements listed above, you must find the defendant "guilty."

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.*]*

COMMENT

Possession of marijuana is prohibited by and defined in Tex. Health & Safety Code § 481.121. The definition of "marijuana" is derived from Tex. Health & Safety Code § 481.002(26) and Tex. Agric. Code § 121.001. The definition of "possession" is from Tex. Health & Safety Code § 481.002(38) and Tex. Penal Code § 1.07(a)(39).

Definition of "Usable Quantity." It is not error for a trial court to refuse to define usable quantity. *E.g., Holmes v. State*, 962 S.W.2d 663, 674 (Tex. App.—Waco 1998, pet. ref'd, untimely filed).

Part of Plant Properly Considered in Determining Weight. In determining the amount of marijuana possessed, the statutory definition permits the jury to include "the plant Cannabis sativa L., whether growing or not," but not "the mature stalks of the plant" or hemp, among other things. Tex. Health & Safety Code § 481.002(26). In *Young v. State*, 922 S.W.2d 676 (Tex. App.—Beaumont 1996, pet. ref'd), the Beaumont court of appeals, relying on *Doggett v. State*, 530 S.W.2d 552, 555 (Tex. Crim. App. 1975), held that "it was the defendant's burden at trial to present evidence of the weight of any materials excluded from the statutory definition of marijuana so as to show the weight alleged and/or proven by the State was incorrect." *Young*, 922 S.W.2d at 677. The case does not address what, if anything, this requires of the jury instruction.

Apparently, it is sufficient if the jury instruction makes clear the weight that must be proved and the statutory definition of marijuana so that the jury can determine what—if any—part of the material relied on by the state should be excluded in determining whether the defendant possessed a specific quantity.

Voluntariness Requirement Language. The voluntariness requirement language is included in the instruction at CPJC 41.8 in this chapter only. It could, of course, be modified and incorporated into the above instruction if the issue of voluntariness is raised. See also the voluntary possession comment at CPJC 41.7.

If modifying this instruction to include the voluntariness requirement language, be certain to also incorporate, at the appropriate locations, the additional element the state must prove and to alter any supporting language (for example, changing "You must all agree on elements 1, 2, 3, and 4 listed above" to "You must all agree on elements 1, 2, 3, 4, and 5 listed above").

CPJC 41.10 Instruction—Possession of Controlled Substance

INSTRUCTIONS OF THE COURT

Accusation

The state accuses the defendant of having committed the offense of possession of a controlled substance. Specifically, the accusation is that [*insert specific allegations, e.g.*, the defendant did knowingly possess a controlled substance, namely, cocaine [in an amount by aggregate weight, including any adulterants or dilutants, of [*insert specific amount, e.g.*, one gram or more but less than four grams]]].

Relevant Statutes

A person commits an offense if the person knowingly possesses a controlled substance [and the amount of the controlled substance is, by aggregate weight, including adulterants or dilutants, [*insert specific amount, e.g.*, one gram or more but less than four grams]].

[Include the following if the evidence does not raise a question concerning a mistaken belief by the defendant regarding the kind of substance.]

[*Substance*] is a controlled substance.

[Include the following if the evidence raises a question concerning the defendant's mistaken belief regarding the kind of substance.]

[*Substance*] and [*substance*] are controlled substances.

[Include the following if the offense does not require a minimum weight.]

To prove that the defendant is guilty of possession of [*substance*], the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant possessed [*substance*]; and
2. the defendant knew he was possessing a controlled substance.

[Include the following if the offense requires a minimum weight.]

To prove that the defendant is guilty of possession of [*substance*], the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant possessed [*substance*]; and

2. the [*substance*] was, by aggregate weight, including adulterants or dilutants, [*insert specific amount, e.g.*, one gram] or more; and

3. the defendant knew he was possessing a controlled substance.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of possession of a controlled substance.

Definitions

Possession

"Possession" means actual care, custody, control, or management.

Knew He Was Possessing Controlled Substance

The phrase *knew he was possessing a controlled substance* means a person was aware that he was possessing something and aware that what he was possessing was a substance that in fact was a controlled substance.

Application of Law to Facts

[Include the following if the offense does not require a minimum weight.]

You must decide whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, [*name*], possessed [*substance*] in [*county*] County, Texas, on or about [*date*]; and

2. the defendant knew he was possessing a controlled substance.

[Include the following if the offense requires a minimum weight.]

You must decide whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, [*name*], possessed [*substance*] in [*county*] County, Texas, on or about [*date*]; and

2. the [*substance*] was, by aggregate weight, including adulterants or dilutants, [*amount*] gram[s] or more; and

3. the defendant knew he was possessing a controlled substance.

[Continue with the following.]

You must all agree on [both elements 1 and 2/elements 1, 2, and 3] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, [either or both of elements 1 and 2/one or more of elements 1, 2, and 3] listed above, you must find the defendant "not guilty."

If you all agree the state has proved [both of the two/each of the three] elements listed above, you must find the defendant "guilty."

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.*]*

COMMENT

Possession of a controlled substance in Penalty Group 1 is prohibited by and defined in Tex. Health & Safety Code § 481.115. Possession of a controlled substance in Penalty Group 2 is prohibited by and defined in Tex. Health & Safety Code § 481.116. Possession of a controlled substance in Penalty Group 3 is prohibited by and defined in Tex. Health & Safety Code § 481.117. Possession of a controlled substance in Penalty Group 4 is prohibited by and defined in Tex. Health & Safety Code § 481.118.

Ultimate User Exemption. The possessory offenses for controlled substances in penalty groups 1, 2, 3, and 4 provide that an offense is not committed if the substance is possessed pursuant to a valid prescription. Tex. Health & Safety Code §§ 481.115, 481.116–.118. Section 481.062(a)(3) provides a similar defense—explicitly an "exception"—for "an ultimate user or a person in possession of a controlled substance under a lawful order of a practitioner or in lawful possession of the controlled substance if it is listed in Schedule V." Tex. Health & Safety Code § 481.062(a)(3). "Practitioner" and "ultimate user" are defined in Tex. Health & Safety Code § 481.002. But section 481.184(a) states that—

> [t]he state is not required to negate an exemption or exception provided by this chapter in a complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this chapter. A person claiming the benefit of an exemption or exception has the burden of going forward with the evidence with respect to the exemption or exception.

Tex. Health & Safety Code § 481.184(a).

As a result, the jury instructions need not address these matters unless evidence has been produced supporting, and thus raising, the matter. *Wright v. State*, 981 S.W.2d 197, 200 (Tex. Crim. App. 1998) ("[A] person claiming the benefit of the 'ultimate user' exemption or defense has the burden of producing evidence that raises the defense. Once the defense is raised, the trial court must, if requested, instruct the jury that a reasonable doubt on the issue requires that the defendant be acquitted.") (citations omitted); *Dudley v. State*, 58 S.W.3d 296, 301 (Tex. App.—Beaumont 2001, no pet.) (in trial for possession of cocaine under section 481.115(a), trial court not required to instruct jury to find that defendant did not have prescription unless defendant produced evidence raising matter).

Identifying Controlled Substances. The evidence may suggest that the defendant may have mistakenly believed the substance that he is charged with possessing was a different controlled substance than what in fact it was.

In this event, it is important that the instructions accurately inform the jury that both what the substance in fact was and the substance the defendant may have mistakenly believed was involved are controlled substances. This is necessary for the jury to apply the requirement that the state prove knowledge that the substance was a controlled substance.

Voluntariness Requirement Language. The voluntariness requirement language is included in the instruction at CPJC 41.8 in this chapter only. It could, of course, be modified and incorporated into the above instruction if the issue of voluntariness is raised. See also the voluntary possession comment at CPJC 41.7.

If modifying this instruction to include the voluntariness requirement language, be certain to also incorporate, at the appropriate locations, the additional element the state must prove and to alter any supporting language (for example, changing "You must all agree on elements 1, 2, and 3 listed above" to "You must all agree on elements 1, 2, 3, and 4 listed above").

CPJC 41.15 Instruction—Possession of Controlled Substance with Intent to Deliver

INSTRUCTIONS OF THE COURT

Accusation

The state accuses the defendant of having committed the offense of possession of a controlled substance with intent to deliver it. Specifically, the accusation is that [*insert specific allegations, e.g.*, the defendant did knowingly possess with intent to deliver a controlled substance, namely, cocaine [in an amount by aggregate weight, including any adulterants or dilutants, of [*insert specific amount, e.g.*, one gram or more but less than four grams]]].

Relevant Statutes

A person commits an offense if the person knowingly possesses with intent to deliver a controlled substance [and the amount of the controlled substance is, by aggregate weight, including adulterants or dilutants, [*insert specific amount, e.g.*, one gram or more but less than four grams]].

[*Substance*] is a controlled substance.

[Include the following if the offense does not require a minimum weight.]

To prove that the defendant is guilty of knowingly possessing [*substance*] with intent to deliver, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant possessed [*substance*]; and
2. the defendant knew he was possessing a controlled substance; and
3. the defendant intended to deliver the controlled substance.

[Include the following if the offense requires a minimum weight.]

To prove that the defendant is guilty of possession of [*substance*] with intent to deliver, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant possessed [*substance*]; and
2. the [*substance*] was, by aggregate weight, including adulterants or dilutants, [*insert specific amount, e.g.*, one gram] or more; and

3. the defendant knew he was possessing a controlled substance; and
4. the defendant intended to deliver the controlled substance.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of possession of a controlled substance with intent to deliver it.

Definitions

Possession

"Possession" means actual care, custody, control, or management.

Deliver

"Deliver" means to transfer, actually or constructively, to another a controlled substance [regardless of whether there is an agency relationship]. The term includes offering to sell a controlled substance.

Adulterant or Dilutant

"Adulterant or dilutant" means any material that increases the bulk or quantity of a controlled substance, regardless of its effect on the chemical activity of the controlled substance.

Knew He Was Possessing Controlled Substance

The phrase *knew he was possessing a controlled substance* means a person was aware that he was possessing something and aware that what he was possessing was a substance that in fact was a controlled substance.

Intended to Deliver Controlled Substance

The phrase *intended to deliver a controlled substance* means it was the person's conscious objective or desire to deliver something and the person knew that the thing he so intended to deliver was a substance that in fact was a controlled substance.

Application of Law to Facts

[Include the following if the offense does not require a minimum weight.]

You must decide whether the state has proved, beyond a reasonable doubt, three elements. These elements are that—

1. the defendant, [*name*], possessed [*substance*] in [*county*] County, Texas, on or about [*date*]; and

2. the defendant knew he was possessing a controlled substance; and

3. the defendant intended to deliver the controlled substance.

[Include the following if the offense requires a minimum weight.]

You must decide whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, [*name*], possessed [*substance*] in [*county*] County, Texas, on or about [*date*]; and

2. the [*substance*] was, by aggregate weight, including adulterants or dilutants, [*amount*] gram[s] or more; and

3. the defendant knew he was possessing a controlled substance; and

4. the defendant intended to deliver the controlled substance.

[Continue with the following.]

You must all agree on [elements 1, 2, and 3/elements 1, 2, 3, and 4] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements [1, 2, and 3/1, 2, 3, and 4] listed above, you must find the defendant "not guilty."

If you all agree the state has proved each of the [three/four] elements listed above, you must find the defendant "guilty."

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.*]*

COMMENT

Delivery of a controlled substance in Penalty Group 1 is prohibited by and defined in Tex. Health & Safety Code § 481.112. Delivery of a controlled substance in Penalty Group 2 is prohibited by and defined in Tex. Health & Safety Code § 481.113. Delivery of a controlled substance in Penalty Group 3 or 4 is prohibited by and defined in

Tex. Health & Safety Code § 481.114. The definition of "deliver" is based on Tex. Health & Safety Code § 481.002(8). The definition of "adulterant or dilutant" is based on Tex. Health & Safety Code § 481.002(49). The definition of "possession" is from Tex. Health & Safety Code § 481.002(38) and Tex. Penal Code § 1.07(a)(39).

Voluntariness Requirement Language. The voluntariness requirement language is included in the instruction at CPJC 41.8 in this chapter only. It could, of course, be modified and incorporated into the above instruction if the issue of voluntariness is raised. See also the voluntary possession comment at CPJC 41.7.

If modifying this instruction to include the voluntariness requirement language, be certain to also incorporate, at the appropriate locations, the additional element the state must prove and to alter any supporting language (for example, changing "You must all agree on elements 1, 2, 3, and 4 listed above" to "You must all agree on elements 1, 2, 3, 4, and 5 listed above").

To affix this supplement to the 2019 main volume, remove the peel-off strip at the right and place the supplement against the inside back cover. Close the back cover and press down firmly along the spine.